

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 323 OF 2006

Shamrao Vishnu Parab Petitioner

versus

Santosh Prabhakar Deshpande Respondent.

Shri V.D.Raut for the petitioner

Shri P.S.Dani for Respondent.

CORAM; A.P. DESHPANDE, J.

DATED; 22ND JUNE, 2007

P.C.;

1. The petitioner is the original plaintiff whereas the respondent is the defendant. Petitioner/plaintiff instituted a suit in the court at Pune for recovery of an amount of Rs. 66,000/- against the respondent/defendant. The suit was instituted in the year 1996. On account of enhancement of pecuniary jurisdiction of C.J.J.D. upto Rs. one lakh, the District Judge passed suo mottu order and the suit came to be transferred from Pune to Pimpri. As the defendant did not appear in the court at Pimpri, the suit came to be decreed exparte. The defendant/respondent filed an application under Order 9 Rule 13 of CPC for setting aside the exparte decree and for restoration of the suit. The trial court has allowed the application and set aside the exparte

decree passed against the defendant and restored the suit, for decision on merit. Aggrieved thereby the present writ petition has been filed.

2. The respondent had stated in his application moved under Order 9 Rule 13 that no notice or intimation had been given to the respondent/defendant when the suit came to be transferred from Pune to Pimpri. It is further asserted that the court at Pimpri also did not issue any notice to the defendant and as such the defendant was not in know of the progress of the suit in the court at Pimpri. Thus it is the case of the defendant that without any notice, an ex parte decree has been passed. The trial court has accepted the case put forth by the respondent by recording a finding that neither the court at Pune nor the court at Pimpri had issued notice or intimated the defendant in regard to the transfer of the suit to Pimpri court and/or the date therein. It has come on record that on transfer of the suit to Pimpri in the year 2000, there was no progress in the suit till 27-11-2001 meaning thereby that the suit was adjourned sine die. On 27-11-2001 the plaintiff moved an application and the suit was taken on board and thereafter without any notice to the defendant issues were framed and the matter proceeded further, resulting in passing of an ex-parte decree. In this fact situation, the

petitioner had contended before the trial court so also before this court that rozanama dated 8-2-2002 records that advocates for both the parties so also the parties are present. There is nothing on record even to remotely indicate that the respondent was made aware of the date in the suit. It is also submitted by the respondent that the said recording of rozanama is incorrect and the trial court, being in know of the situation of suit at Pimpri, has accepted that the rozanama does not reflect the correct position. The trial court has relied upon the other circumstances as well. Taking a liberal approach, in the above fact situation, the trial court had restored the suit after setting aside the exparte decree. Aggrieved thereby the present writ petition has been filed.

3. The learned counsel for the petitioner/plaintiff has submitted that there was delay caused for filing of application. Hence the defendant should have filed a separate application seeking condonation of delay.

4. Per contra, the learned counsel for the respondent submits that the limitation would start from the date of the knowledge and the application was filed within the limitation from the date of knowledge. Technically speaking the submission of the learned counsel for the petitioner is well merited. However

if such pedantic approach is adopted and the impugned order is interfered with, the same is bound to result in miscarriage of justice in as much as without affording an opportunity to the defendant, he will have to suffer the ex-parte decree. I am of the clear view that the trial court has rightly taken a pragmatic approach in setting aside the ex-parte decree. The impugned order is a right order. Even assuming for the sake of argument that the impugned order is illegal, still in my view setting aside of a right order would restore a wrong order and hence I declined to interfere with the impugned order. The learned counsel for the petitioner has then pointed out that the respondent claims to have succeeded in trespassing the suit for the first time in the year 2005. The suit was transferred in the year 2000 and the lapse of a period of 4 to 5 years itself reveal that the respondent has not been diligent and/or has intentionally or deliberately protracted the suit. On this count, it is urged that the trial court should have saddled the cost on the respondent and even that has not been done by the trial court. This grievance of the petitioner deserves favourable consideration.

5. In the result though I do not propose to interfere with the impugned order and proceeds to dismiss the petition to that extent. I direct that the impugned

order shall be subject to payment of cost of Rs. 6,000/-. Cost to be paid within a period of four weeks from today. C.A. accordingly disposed of.

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